TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1401~~. ~~1097~~ ~~784~~ 318

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY K. WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 12, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1484.

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY K. WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Bill for Partition of Real Estate. Filed Jan.* 3, 1888.

In the Supreme Court of the District of Columbia, the 3d day of January, A. D. 1888. In Equity.

HENRY K. WILLARD, Complainant,
vs.
JOSEPH C. WILLARD, Defendant. } No. 10945, Docket 27.

Bill of complaint.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainant says as follows:

1. The complainant, Henry K. Willard, and the defendant, Joseph C. Willard, are both residents of the city of Washington, in the District of Columbia; and the complainant sues in his own right and the defendant is sued in his own right for partition of the real estate and premises in said city of Washington hereinafter to be specified and described.

2. The complainant and the defendant are the owners in fee simple, as tenants in common, of lots of ground numbered one (1), two (2), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), in square numbered two hundred and twenty-five (225), in said city of Washington, according to the official plan thereof, together with the buildings and improvements thereon, consisting of a large hotel building, known by the name of "Willard's Hotel," and an annex thereto and used as part thereof, known by the name of "Willard's Hall."

2 The complainant and the defendant are each of them owners of one undivided half part of said real estate and premises.

3. The complainant has become and is now the owner of an undivided half part of said real estate and premises under and by virtue of a deed of conveyance thereof to him by Henry A. Willard, bearing date on the 1st day of December, A. D. 1887, and duly recorded among the land records of the District of Columbia.

4. The complainant desires to have partition of said real estate and premises, and to have his share thereof set apart to him in severalty; or if, in the opinion of the court, the said real estate cannot be specifically divided and partitioned between the parties without loss and injury to them and to the purposes for which said real estate and premises are used, he desires that, for the purposes of partition, the same may be sold and the proceeds divided between the complainant and the defendant.

The complainant therefore prays as follows:

1. That said Joseph C. Willard be made a party to this cause as defendant, and be served with process and required to make answer thereto.

2. That testimony be taken and inquiry made to ascertain whether said real estate and premises are capable of specific partition
3 between the parties to this cause without loss or injury to them or either of them.

3. That if, in the opinion of the court, it shall be found that said real estate and premises are capable of specific partition, then the same — be partitioned by the court between the parties.

4. That if, in the opinion of the court, it should be found that the said real estate and premises are not capable of specific partition between the parties without loss or injury to them, then the same should be sold and the proceeds of sale should be divided between the parties.

5. That the complainant may have such further and other relief as the nature of his case may require.

HENRY K. WILLARD.

M. F. MORRIS,
Solicitor & of Counsel.

I do solemnly swear that I have read the foregoing bill of complaint signed by me, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

HENRY K. WILLARD.

Subscribed and sworn to before me this 3 day of January, A. D. 1888.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

4 *Subpœna to Answer. Issued Jan'y 3d*, 1888. *Returned Jan'y 5th*, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD, Complainant,
against
JOSEPH C. WILLARD, Defendant. } No. 10945, Equity Doc. 27.

JANUARY 3D, 1888.

The President of the United States to Joseph C. Willard, defendant:

You are hereby commanded to appear in this court, at its first special term occurring ten days after service of this subpœna, and answer the exigency of the original bill, under pain of attachment and such other process of contempt as the court shall award.

Witness E. F. Bingham, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk, &c.*
By M. A. CLANCY, *Ass't Clerk.*

MEMORANDUM.—That the defendant herewith served is to enter his appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's Return.

Served Joseph C. Willard January 3d, 1888.
A. A. WILSON, *Marshal.*

5 *Order Book* 10, *Page* 319.

Supreme Court, District of Columbia.

H. K. WILLARD
vs.
Jos. C. WILLARD. } No. 10945.

Enter my appearance for the defendant.
2, 7, '88.

W. F. MATTINGLY.

Appearance entered as directed Feb'y 7, '88, by the clerk.

Answer. Filed Mar. 6, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Equity No. 10945.

The answer of Joseph C. Willard, defendant, to the bill of complaint of Henry K. Willard, complainant, against him in equity exhibited.

For answer to said bill of complaint, or to so much thereof as I am advised it is material and proper for me to make answer unto, answering the same, I say and aver as follows:

6 1. I admit the averments of this paragraph of the bill as to the residence of the parties and the purpose of the suit.

2. Henry A. Willard, the father of the complainant, and myself were the owners in fee simple, as tenants in common, of said lots one (1), two (2), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), in square numbered two hundred and twenty-five (225), together with the buildings thereon, known as Willard's Hotel, which said property has been continuously used as and devoted to the purposes of a public hotel for a great many years and is still so used. Said property is of great value, and for the past twenty-five years and upwards has been leased by said Henry A. Willard and myself to different persons for hotel purposes, and is now under lease and used as a hotel at a remunerative rental.

3. I have heard that said Henry A. Willard conveyed his undivided moiety of said property to his son, Henry K. Willard, the complainant, but I have no knowledge thereof, and can therefore neither admit nor deny the same, but require proof thereof.

If such conveyance has been made I aver that the same was without valuable consideration from said Henry K. Willard and upon secret trust for the use and benefit of said Henry A. Willard, and that he is the real owner of said moiety and is a necessary party to this cause.

4. Having no knowledge of what the complainant desires
7 in respect of the partition of said property, I presume that I am neither expected nor required to answer this paragraph of the bill of complaint.

5. I deny that I should be compelled to make or suffer partition of said real estate.

6. I respectfully charge and aver that it is not within the power of the court to deprive me, against my will and without my consent, of my interest and estate in the whole of said property, either by a partition in severalty or by a sale thereof.

And, having fully answered said bill of complaint, I pray that the same may be dismissed with costs.

JOSEPH C. WILLARD.

I, Joseph C. Willard, do swear that I am the defendant in this cause; that I have read the foregoing answer signed by me and know the contents thereof; that the facts therein stated as of my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOSEPH C. WILLARD.

Subscribed and sworn to before me this 24th day of February, A. D. 1888.

ROBERT V. HUGHES, [SEAL.]
Notary Public.

WM. F. MATTINGLY,
Sol'r for Def't.

8 *Replication. Filed Mar.* 13, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Eq. No. 10945.

The complainant joins issue on the answer of the defendant filed herein.

MORRIS & HAMILTON,
Solicitors for Complainant.

Order Limiting Time to Take Testimony to Forty Days. Filed Mar. 22, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Eq. No. 10945.

It is by the court, on this 22d day of March, A. D. 1888, ordered that the parties to this cause be, and they are hereby, limited to forty days from this day to take testimony in said cause; that of this time the complainant shall have ten days within which to take testimony-in-chief and the defendant shall have twenty days
9 thereafter for his testimony and the complainant shall have ten days thereafter for testimony in rebuttal.

W. S. COX, *J.*

S'p'a ad Test. Issued M'ch 24, 1888. *Returned M'ch* 27, 1888.

Supreme Court of the District of Columbia, the 24th day of March, 1888.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } No. 10945, Docket 27.

The President of the United States to Thomas J. Fisher, Brainard H. Warner, James E. Fitch, Robert O. Holtzman, and Thomas E. Waggaman:

You are hereby commanded to appear as witnesses for the complainant before M. J. Colbert, examiner in chancery, on the 27th day of March, 1888, at 3 o'clock p. m., at the office of Morris & Hamilton, 1315 F street northwest, Washington, D. C., and not depart the court without leave.

Witness E. E. Bingham, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk, &c.

Marshal's Return.

Summoned all M'ch 26, 1888.

A. A. WILSON, *Marshal.*

10 *Order Book* 10, *Page* 359.

Supreme Court, District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Eq. No. 10945, Doc. 27.

The clerk will please calendar this cause for hearing at the next special term of the court (May term).

Ap'l 21, 1888.

MORRIS & HAMILTON,
Sol'rs for Compl't.

Calendared as ordered, by the clerk, '88, 4, 21.

11 *Complainant's Depositions. Filed Ap'l* 21, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Eq. No. 10945.

I, M. J. Colbert, an examiner in chancery, do hereby certify that, pursuant to the notice hereto attached, I did cause to be personally present before me at the times and places within noted the witnesses whose depositions hereinafter appear for the purpose of taking depositions on behalf of the complainant in the above-entitled cause; that the said witnesses were by me first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause, and their depositions were then and there taken by me from their oral statements then and there made; were afterwards read over by me to said witnesses, acknowledged by them to be correct, and subscribed and sworn to in my presence.

I further certify that I am not of counsel for any of the parties to said cause and am in no measure interested therein, and I return the said depositions so taken by me to this court for its further action.

M. J. COLBERT,
Examiner in Chancery.

12 In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Equity No. 10945.

Take notice that on Tuesday, the 27th day of March, A. D. 1888, at 3 o'clock p. m., we will proceed to take depositions on behalf of

the complainant in the above-entitled cause, at our office, in the Sun building, 1315 F St. N. W., Washington, D. C., before M. J. Colbert, examiner in chancery.

MORRIS & HAMILTON,
Solicitors for Complainant.

To William F. Mattingly, Esq., solicitor for defendant.

Service of a copy of above notice on me acknowledged this 23d day of March, A. D. 1888.

W. F. MATTINGLY,
Sol'r for Def't.

The witnesses to be examined are Thomas J. Fisher, Brainard H. Warner, James E. Fitch, Robert O. Holtzman, and Thomas E. Waggaman.

13 In the Supreme Court of the District of Columbia.

HENRY K. WILLARD, Complainant,
vs.
JOSEPH C. WILLARD, Defendant. } Eq. No. 10945.

WASHINGTON, D. C., *March 27th*, 1888.

Met pursuant to notice at the office of Morris and Hamilton, solicitors for complainant, Sun building, 1315 F street N. W., at 3 o'clock p. m., to take depositions on behalf of the complainant.

Present: M. F. Morris and G. E. Hamilton, for complainant; W. F. Mattingly, Esq., for defendant, and the examiner.

Mr. HAMILTON: I offer in evidence a certified copy of deed from Henry A. Willard and wife to Henry K. Willard, which is filed, marked "H. K. W. 1."

THOMAS J. FISHER, a witness of lawful age, was produced on behalf of the complainant, and, having been first duly sworn, testified as follows:

Examined by Mr. HAMILTON:

I am a member of the firm of Thos. J. Fisher & Co., and have been in the real estate business since 1851, more or less. I am familiar with real estate in Washington city and with the values thereof.

Q. Are you acquainted with what is known as the Willard Hotel property?

14 A. I am, sir.

Q. That property consists of lots 1, 2, 12, 13, 14, 15, and 16, in square 225. What is the value of that property, in your opinion?

A. I think the property is worth about $600,000.00.

Q. In your opinion, is that property susceptible of partition in kind between two tenants in common?

A. I hardly think it could be divided without damage to one or the other or both the parties.

Q. Will you give some reason why it could not be?

A. Well, in the first place, in my judgment, it is the best hotel site in Washington, in its entirety, and, in the next place, it is now under rent, as I understand; in fact, I negotiated the lease of it some ten or twelve years ago for $20,000.00 a year net, the lessee paying all taxes, insurance, and repairs, so that to partition property of that sort would seem to be very damaging to all interests.

Q. Would a partition of that property into two parts lessen its value as a hotel site?

A. I should say so, decidedly.

Q. You don't think two hotels could be built there to the same advantage that one could?

A. No, sir; I don't think there is more land there than would be required for one hotel, such a hotel as is needed in Washington. It would be necessary to extend it from street to street in order to get proper ventilation, light, ingress, and egress.

Q. And you think, then, it is peculiarly adapted to hotel purposes as it now stands?

15 A. Yes; in my judgment, it is the best hotel site in Washington to-day.

Cross-examination by Mr. MATTINGLY:

Q. How many feet of ground are there in this land?

A. There are thirty-three thousand four hundred and something—four hundred and sixty, I think.

Q. Your estimate of value is in part, of course, based upon the area of the property?

A. Yes, sir; and the improvements.

Q. Without any improvements what would be the value of that land per foot?

A. Well, there are portions of it on the Avenue front, from the corner, perhaps, that I should think would sell for $30.00 per square foot; the other adjoining lots, perhaps, for $25.00. Back to the F-street front the corner there would probably sell for $15.00 per square foot, and the adjoining lots on that street for $10.00 or $12.00; then on the 14th-street front I should say $8.00 or $9.00.

Q. You don't mean to say that, as a matter of fact, the property could not be divided into two equal parts?

A. Why, certainly not. It could be divided into two equal parts, but to accomplish that I think you would destroy the value of the improvements.

Q. The improvements are not adapted to a first-class hotel, are they?

A. No, sir; I don't think they are up to the modern requirements. Still it is a hotel that will rent for the next fifteen or twenty years and will serve its purpose.

16 Q. By $600,000.00 do you mean that as the reasonable market value of the property—what it would bring at auction, or what?

A. I mean by that, of course, it is a large piece of property, and it is a difficult matter to get down to its value. What I mean is if I were the owner I would not be willing to sell it for less than $600,000.00. I believe if it were to be sold that it would bring that or more.

Q. I understand you to say that if you were the owner and wanted to sell you would sell for that?

A. Yes, sir; I would. I should be like everybody else; I would want to get the best possible price for it. If I could get more than that of course I should like to get it; but, according to my present ideas, I think that is a fair price. I think it would average about $18.00 per foot.

Q. As a whole?

A. Yes, sir.

Q. Do you mean to express it as your opinion that if the property was divided in kind, equally, that one-half of the vacant land would not sell for $300,000.00?

A. No; I don't think it would. It depends on which half you take. Taking the Avenue half, you can, perhaps, get more than $300,000.00.

Q. One-half of the value divided in kind, I mean.

A. Well, I doubt very much if you could, sir, on my basis of valuation. My basis of valuation is an allowance of anywhere from $50,000.00 to $75,000.00 for improvements.

Q. Is that valuation for the improvements included in your estimate of $18.00 per foot?

17 A. Yes, sir.

Q. Then you allow about $2.00 per foot for the improvements?

A. Yes; about that; $50,000.00 or $75,000.00 for the improvements.

Redirect examination by Mr. HAMILTON:

Q. Would a division in kind destroy or diminish the value of the improvements?

A. Well, anyway it would destroy the income of $20,000.00, and that represents a capitalization of $333,000.00, and of course any division of it would destroy its value to that extent.

THOS. J. FISHER.

BRAINARD H. WARNER, a witness of lawful age, was produced on behalf of the complainant, and, having been first duly sworn, testified as follows:

Examined by Mr. HAMILTON:

I am forty years of age, and have been in the real estate business in Washington since 1869, and am well acquainted with the values of real estate, having made numerous sales, both public and private.

Q. Are you acquainted with the property described in these proceedings, known as the Willard Hotel property?

A. I am.

Q. Would you state whether, in your opinion, this property is susceptible of partition in kind between two tenants in common?

18

A. It is, of course, susceptible of partition, but, in my opinion, it should be sold as a whole, as to cut it up will injure the value of each piece or of the smaller pieces in which it might be subdivided.

Q. Then while it is possible, in your opinion, to make a partition it is not possible to make an advantageous partition between the parties?

A. It is not.

Q. In giving this opinion have you taken into consideration the fact that the property is covered by a large building, used for hotel purposes, under rent for about $20,000.00 a year?

A. Of course I suppose you mean the property as it now stands. I don't mean if it were a vacant lot.

Q. In your opinion does this location afford any peculiar advantages for the purpose for which it is now used—hotel purposes?

A. I think it is the best location in Washington for a hotel, both because of its well-known reputation, which has been established for many years, and the fact that it is so accessible, being on two lines of street cars and centrally located.

Q. Does the fact that it fronts on three streets give it any peculiar advantages for a hotel site?

A. Of course; also the fact that it has an alley in the interior.

Q. In your opinion, then, it would be to the best advantage of the joint holders of this property to sell rather than attempt a partition in kind?

19

A. Yes, sir.

Cross-examination by Mr. MATTINGLY:

Q. Why do you entertain that opinion?

WITNESS: The one that I have just expressed, that it would be to the best interests of the parties to sell rather than to subdivide?

Mr. MATTINGLY: Yes.

A. Because I think the property will bring $5.00 per foot more if sold as a whole than it would under any circumstances if sold in single lots. I think the property is worth $20.00 per foot as it now stands. Cut it up into lots and face them either on Pennsylvania avenue, F street, or 14th street and you can't begin to make it bring that amount.

Q. Do you mean $20.00 per foot on an average all through?

A. Yes, sir; if sold as a whole.

Q. If sold as a whole, what, if any, additional sum would the property bring, in your opinion, by reason of the existing improvements on it?

A. I think probably from $50,000.00 to $100,000.00 more than if without them.

Q. Is that sum included in your estimate of $20.00 per foot?

A. It is.

20 Q. If divided in kind, assuming from Mr. Fisher's testimony that there are thirty-three thousand square feet of ground, your valuation would amount to $660,000.00 for the whole. Do you mean to say that one-half of that property would not, in your opinion, sell for $330,000.00?

A. I don't think either half would sell for that amount.

Q. What, in your opinion, would be the difference in the price that would be realized?

A. Well, from $100,000 to $150,000. The F-street front is from 20 to 30 feet below grade and, for many other reasons, is not nearly so desirable as the Avenue front. Taken together, for hotel purposes the whole lot is very desirable.

Q. Your valuation, then, as I understand from your testimony, is based upon the sale of the property for hotel purposes?

A. Yes, sir; I base it almost entirely upon that ground.

Q. Do you know how long it has been used for that purpose?

A. I can remember that it has been used for twenty-five years for hotel purposes.

BRAINARD H. WARNER.

JAMES E. FITCH, a witness of lawful age, was produced on behalf of the complainant, and, having been first duly sworn, testified as follows:

Examined by Mr. HAMILTON:

I am a member of the firm of Fitch, Fox and Brown, real estate agents, and am familiar with the values of real estate in Washington.

21 Q. Are you acquainted with the property, known as the Willard Hotel property, involved in this suit?

A. Yes, sir.

Q. For the purpose of shortening the session I will ask you simply if you have heard the testimony given by Mr. Fisher and Mr. Warner?

A. I have.

Q. And if, having heard that testimony, you will state whether you concur or disagree with the opinions expressed by them and the reasons for such concurrence or disagreement.

A. Well, I would state that I fully concur in Mr. Fisher's evidence and for about the same reasons as given by him, with one exception, perhaps—that is, making the value a little larger. I should consider the property worth fully $20.00 per foot—that is, with the improvements—as a whole. I think Mr. Fisher put it at $600,000.00. With Mr. Warner's evidence in general I agree. I differ in some minor respects, especially in one. I should say that the lower half—that is, the Avenue half—would sell for more than one-half of $660,000.00; the upper half not for so much.

Q. In your opinion, then, it could not be advantageously partitioned in kind among joint holders?

A. I think it would be better as it is, sir.

Cross-examination by Mr. MATTINGLY:

Q. Your valuation of the entire property as a whole, as I understand, is $20.00 per foot—$660,000.00—with the improve-
22 ments. In selling that property—say as a whole—in your opinion, what difference would the existence of the improvements make?

A. I should think about $50,000.00, not because they are not worth more, but because they would not bring more.

Q. Is your estimate based upon the use of the property as a whole for hotel purposes?

A. Very largely. As to that the previous witnesses have said—and I fully concur with them in the statement—that it is probably the best site in the city for a hotel, and it would be ruined for hotel purposes if divided—I mean for a good hotel. It is none too large as it is.

Q. To utilize that property for hotel purposes would not a new building, a modern hotel, have to be constructed?

A. To make the most of it, it might be so.

Q. In that view would not the existing improvements be rather a disadvantage than an advantage?

A. Yes; with a new hotel there is nothing there that would be of much value. There would be some inside work that could be used, but it would not amount to very much.

Q. If divided in kind between two owners, in your opinion, how much less would it realize by sale?

A. Do you mean as a hotel—making two hotels of it?

Mr. MATTINGLY: No; I mean if instead of selling it as a whole it were divided between two owners in kind, how much less would they realize by selling the property than if it were sold as a whole?

A. It is pretty hard to answer that question, but I think it would be a very material loss.

23 Q. In your opinion would one-half of that property in value, separated in kind, not bring $330,000.00?

A. I think the lower half would bring more, possibly; the upper half not so much.

Q. I mean that in a division in kind, which, of course, would be a division in proportion to value—if the lower half is more valuable, then whoever got the lower half would get the less quantity of square feet. Now, my question is whether one-half in value, but in kind, would, in your opinion, sell for $330,000.00.

A. I think not, sir; I should think not.

Q. How much less?

A. In the first place, I put the buildings at $50,000.00. They would have to come down. It is very hard to state in dollars and cents, but I hardly think it would bring that, because I think it derives its great value from its site as a hotel.

Q. Do you think, on an average, divided in kind, the lots would bring, as vacant lots, $20.00 per square foot?

A. I hardly think so. There would be certain lots on 14th street that certainly would not be worth that, and some on F street. While,

to be sure, the corner on Pennsylvania avenue would be worth much more, which would help the average, but at the same time I hardly think it would bring that amount, broken up in that way.

Q. Can you express an opinion as to what it would bring?

A. Yes, sir. I should say two or three dollars less—say $15.00 per foot, on an average. Leaving out the buildings, I think,
24 at $600,000.00, it is $18.00 for the land; at $15.00 it would be three dollars less. I should think from $15.00 to $16.00 per foot.

Redirect examination by Mr. HAMILTON:

Q. It has been spoken of dividing this property into two parts, and you have stated that you think the Avenue part would sell, as I understand you, for more than one-half of the sum that you have named—$660,000.00. Suppose that the Avenue part was subdivided into, say, six lots, there being one hundred and forty feet front on the Avenue, do you think they would bring more than one-half of $660,000.000?

A. No; I don't think so. I stated that it would bring that amount, taking into account the improvements. I think I stated that, as it stands, it would bring one-half of $660,000.

JAMES E. FITCH.

Adjourned to Thursday, March 29, A. D. 1888, at 3 o'clock p. m.

25 WASHINGTON, D. C., THURSDAY, *March* 29, 1888.

Met pursuant to adjournment at the office of Morris & Hamilton, Sun building, 1315 F street N. W., at 3 o'clock p. m.

Present: G. E. Hamilton, solicitor for complainant; W. F. Mattingly, solicitor for defendant, and the examiner.

Whereupon, at the request of Mr. Hamilton, the session was adjourned until Saturday, March 31st, 1888, at the same hour and place.

WASHINGTON, D. C., SATURDAY, *March* 31, 1888.

Met pursuant to adjournment at the office of Morris & Hamilton, Sun building, 1315 F street N. W., at 3 o'clock p. m.

Present: G. E. Hamilton, solicitor for complainant; W. F. Mattingly, solicitor for defendant, and the examiner.

Whereupon THOMAS E. WAGGAMAN, a witness of lawful age, having been first duly sworn, testified as follows:

Examined by Mr. HAMILTON:

My name is Thomas E. Waggaman, and I am a real estate
26 broker; I am familiar with the values of real estate in the District of Columbia.

Q. Are you acquainted with the property known as the Willard Hotel property, in this city?

A. I am.

Q. Will you state whether, in your opinion, that property is susceptible of advantageous partition between two joint owners?

A. I don't think it is.

Q. Will you state why?

A. I think the property is more salable as a whole than it would be if divided, and it would pay a better interest on the money in that way than any other.

Q. Do I understand you to be of the opinion that the property, if divided into lots and sold, would sell for less than if sold as a whole for a hotel or for other purposes?

A. I think the property subdivided might probably sell more readily to several customers than as a whole, but if a person could be gotten who wished to put a hotel upon the property for that purpose it would bring more than if subdivided.

Q. In your opinion, what is the value of that property?

A. I figured on the property, and my idea as to the value is $400,000.00 for the ground. Of course, if the property was to be used as a new site, the building would be worth nothing more than the cost of pulling it down.

Mr. MATTINGLY: That is, of no value at all?

WITNESS: No value at all; but in view of the fact that the
27 property is now renting, as I understand, for $20,000.00 a year net, and as there might be no immediate purchaser for the property, I should think the building could be estimated at from $40,000.00 to $50,000.00. I don't think there is a man in town now who would probably give $400,000.00 for the property—that is, at this time—as such purchasers are scarce. My idea would be to use the present buildings until such a purchaser could be found, and in that case I would estimate the value of the buildings as above stated.

Q. Could the building, if divided into two buildings, be as advantageously used as one building, as it now stands?

A. I don't think so.

Cross-examination by Mr. MATTINGLY:

Q. How long have you been in the real estate business?

A. About twenty years; a little over twenty years.

Q. If this property was divided in kind in two parts of equal value, which, in your opinion, I presume, could be done——

A. Oh, yes; that could be done.

Q. Are you of the opinion that one of those parts could be sold for at least $200,000.00 and speedily?

A. I don't think that either part, if equally divided, would sell as soon for $200,000.00 as the whole would for $400,000.00.

Q. By a sale of one of those parts I mean, of course, and presume you so understood me, that these parts would be subdivided into smaller-sized lots. Now, would not the readiness with which
28 property of that kind and in that neighborhood would sell secure a speedy sale and realize with more certainty than the delays and uncertainty in waiting for the purchaser for the property as a whole?

A. There is no doubt in my mind that a more speedy sale could be found for the property by a subdivision into business lots, as, of course, a purchaser for a tract worth $400,000.00 is hard to obtain; but I doubt whether the property, if subdivided into business lots, would bring $400,000.00. I think there would be no difficulty with regard to the F-street or the Avenue front, but I think the 14th-street property in that case would be hard to get rid of.

Q. If the property were subdivided and sold in smaller lots, in your opinion, how much less than $400,000.00 would it bring?

A. Well, for a speedy sale, say from sixty days to six months, I should say $50,000.00 less.

THO. E. WAGGAMAN.

Mr. HAMILTON: I here offer in evidence the lease from Joseph C. Willard and Henry A. Willard to Phebe D. Cooke, and the assignment of said lease *to* said Phebe D. Cooke to Orrin G. Staples, and the consent of H. A. Willard and J. C. Willard to such assignment.

A correct copy of said lease, by consent of counsel, is accordingly filed and marked by the examiner "H. K. W. 2."

The foregoing depositions of Thos. J. Fisher, James F. Fitch, Brainard H. Warner, and Thomas E. Waggaman were sub-
29 scribed and sworn to in my presence this 21st day of April, A. D. 1888.

M. J. COLBERT,
Examiner in Chancery.

Mr. Hamilton, solicitor for the complainant, here announces that he has closed his case in chief, and the same was accordingly done.

M. J. COLBERT,
Examiner in Chancery.

"H. K. W. 1." M. J. Colbert, Examiner.

Deed. Henry A. Willard et ux. to Henry K. Willard.

OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA, WASHINGTON, D. C., —— —, 18—.

Recorded Dec. 3d, 1887, 11.25 a. m., Liber No. 1298, folio 33.

This indenture, made this first day of December, in the year of our Lord one thousand eight hundred and eighty-seven, by and between Henry A. Willard and Sarah B. Willard, his wife, of the city of Washington, in the District of Columbia, of the first part, and Henry K. Willard, of the same place, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration
30 of the sum of ten dollars (and for divers other good and valuable consideration) in lawful money of the United States to

them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said party of the second part and his heirs and assigns forever the following-described real estate, situate in the city of Washington, District of Columbia, to wit: All those certain pieces or parcels of land and premises known and distinguished as and being the undivided one-half part of lot numbered one (1), two (2), twelve (12), thirteen (13), fourteen (14), fifteen 15), and sixteen (16), in square numbered two hundred and twenty-five, according to the official plans and records of said city, together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, either at law or in equity, of the said parties of the first part of, in, to, or out of the said piece or parcel of land and premises; to have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part and his heirs and assigns to his and their sole use, benefit, and behoof forever; and the said parties of the first part, for themselves and each of them and for their and each and every of their heirs, executors, and administrators, do hereby covenant, promise, and agree to and with
31 the said party of the second part and his heirs and assigns that they, the said parties of the first part, and their heirs shall and will warrant and forever defend the said pieces or parcels of land and premises and appurtenances unto the said party of the second part and his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by, from, under, or through them or either or any of them; and, further, that they, the said parties of the first part, and their heirs shall and will, at any and at all times hereafter, upon the request and at the cost of said party of the second part, his heirs or assigns, make, execute, deliver, and acknowledge all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or his or their counsel learned in the law shall advise, devise, or require.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

HENRY A. WILLARD. [SEAL.]
SARAH B. WILLARD. [SEAL.]

Signed, sealed, and delivered in the presence of—

EDWARD J. STELLWAGEN.

DISTRICT OF COLUMBIA, *ss*:

I, Edward J. Stellwagen, a notary public in and for the
32 District aforesaid, do hereby certify that Henry A. Willard and Sarah B. Willard, his wife, parties to a certain deed bearing date on the first day of December, A. D. 1887, and hereunto annexed, personally appeared before me in the District aforesaid, the said Henry A. Willard and Sarah B. Willard, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Sarah B. Willard, wife of Henry A. Willard, being of full age and being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same and that she wished not to retract it.

Given under my hand and notarial seal this third day of December, A. D. 1887.

EDWARD J. STELLWAGEN, [SEAL.]
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss*:

OFFICE OF RECORDER OF DEEDS.

I, James M. Trotter, recorder of deeds of the District of Columbia, do hereby certify that I have compared the annexed copy of deed with the record of the original thereof, recorded in this office on the 3d day of December, 1887, at 11.25 a. m., in Liber No. 1298, one of the land records of the District of Columbia, on page 33, and that the same is a correct transcript therefrom and of the whole of said record.

In testimony whereof I have hereunto set my hand and affixed my official seal this 24th day of March, 1888.

[SEAL.] JAS. M. TROTTER,
Recorder of Deeds, District of Columbia.

33 H. K. W. 2. M. J. Colbert, Examiner.

This indenture, made this 8th day of May, A. D. 1883, between Joseph C. Willard and Henry A. Willard, of the city of Washington, D. C., of the first part, and Phœbe D. Cook, widow of Joseph C. Cooke, deceased, of the same place, of the second part, witnesseth: That for and in consideration of the rents hereinafter agreed to be paid and the covenants and agreements hereinafter agreed to be kept by the party hereto of the second part the said parties of the first part have leased and demised, and do hereby lease and demise, unto the said party of the second part, her executors and administrators, all those pieces of ground and premises situated in the said city of Washington, in the District of Columbia, and known as lots numbered one (1), two (2), fifteen (15), and sixteen (16), and also lots numbered twelve (12), thirteen (13), and fourteen (14), in square numbered two hundred and twenty-five (225), on the official plan of

said city of Washington, together with the buildings and improvements thereon, known as "Willard's Hotel" and "Willard's Hall," and the rights, privileges, and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the same unto and to the use of the said party of the second part, her executors and administrators, for and during the term of five years and four months next to be completed from and after the first day of January, A. D. 1884, upon condition of the prompt and faithful payment of rent therefor in manner and form as follows, to wit:

34 The sum of twenty thousand and five hundred dollars yearly and every year, to be paid in monthly installments in advance on the first day of each and every month, being $1,708.33⅓ for each month, the first payment to be made on the first day of January, 1884, and being in all for the whole term the sum of $109,333.33⅓, which is to be entirely free and clear from all charges and deductions whatsoever; and the said party of the second part, for herself, her heirs, executors, and administrators, hereby covenants and agrees with the said Joseph C. Willard and Henry A. Willard, their heirs and assigns, as follows, to wit:

1. That she, the said party of the second part, and her executors and administrators will promptly and faithfully pay the aforesaid monthly instalments of rent as they accrue, due in advance, as hereinbefore specified, to the said parties of the first part, their heirs and assigns.

2. That she, the said party of the second part, and her executors and administrators will promptly and faithfully pay all taxes, assessments, and public dues and charges of every kind that may be levied or assessed or accrue at any time during the continuance of said term, and that she will not permit such taxes, assessments, dues, or charges at any time during the said term to become and remain in arrears and unpaid either for the whole or any part thereof.

3. That she, the said party of the second part, her executors or administrators, shall keep the said demised premises in good condition and repair during said term and surrender the same in like good condition at the end of said term, ordinary wear and

35 tear and damages by the elements excepted, and she shall likewise keep all the fixtures, as hereinafter enumerated and described, in the same good order and condition and so deliver them up at the end of the term, reasonable and ordinary wear and tear and damages by the elements excepted.

4. That she, the said party of the second part, her executors or administrators, shall continue the said hotel by the name of "Willard's Hotel" and the said hall by the name of "Willard's Hall" and neither of them by any other designation whatsoever.

5. That she, the said party of the second part, her executors or administrators, shall not assign this lease or assign or sublet the said demised premises or any part thereof without the consent in writing previously obtained of the parties of the first part, their heirs or assigns, excepting such portion as may be necessary for a barber shop, cigar stand, and newspaper stand and excepting livery-

stable stand and telegraph office, as heretofore used, and Willard's Hall for concerts, lectures, and such like purposes.

6. That she, the said party of the second part, her executors or administrators, shall keep in good order and condition certain mirrors with cornices, two iron safes, marble clock, key rack, certain gas fixtures now on the premises (all of which are the property of the parties of the first part and shall so remain), and also office desks of all kinds, as well *as* those now on the premises as those which may hereafter be placed by the party of the second part thereon, and she shall restore and repair any of said articles
36 that may be destroyed or injured during said term, and shall surrender them all with the premises at the end of the term in good condition, ordinary wear and tear and damages by the elements excepted.

7. That the furniture now on the premises and all the furniture that may be put thereon during the term of this lease shall remain on the premises until the end of said term as security for the payment of the rent hereinbefore reserved.

8. That said party of the second part, her executors or administrators, shall insure and keep insured the said furniture during the continuance of this lease in some good and responsible insurance company or companies to the amount of sixty thousand dollars ($60,000.00), and shall assign the policies of insurance to the parties of the first part as additional security for the payment of the rent aforesaid; and said parties of the first part hereby covenant at their own expense to paint with two coats, in such colors and in such manner as shall be approved by the party of the second part, the whole exterior of said buildings, such painting to be done prior to the commencement of said term.

It is hereby agreed that all fixtures, including therein water-closets, marble slabs, elevator, boiler ranges, engines, shafting, piping, gas and steam fixtures of every kind, permanent kitchen apparatus, bath-tubs, wash-tubs, lamps, and all articles and apparatus of every kind and description whatsoever attached or in any manner affixed to the buildings shall become part of the freehold, and shall not be removed from the premises either during the term or at
37 its termination, but shall become the property of the parties of the first part equally with similar fixtures, articles, and apparatus now on the premises.

It is further agreed that the party of the second part in repairing the roof of the premises, if such repair be necessary at any time, shall not use or permit the use of tar or other material not acceptable to the parties of the first part, their heirs or assigns.

It is further agreed that the parties of the first part, their heirs or assigns, upon giving one day's previous notice to the party of the second part, her executors or administrators, shall have the right at any time during the continuance of this lease to go upon said premises and any and every part thereof, either alone or with experts, at seasonable hours during the daytime, to inspect the condition thereof.

It is further agreed that in the event of the violation by the party

of the second part, her executors or administrators, of any of the covenants or agreements of this lease covenated or agreed to be kept by her the parties of the first part, their heirs or assigns, may declare this lease at an end and may proceed to recover possession of the demised premises under the laws of the District of Columbia relating to forcible entry and detainer without being put to their action for ejectment or other suit at law.

It is further agreed that if the said buildings hereby demised shall, during the continuance of said term, be destroyed or rendered unfit for occupation by fire the rent hereinbefore reserved shall thereupon cease and be suspended until such time as the said Joseph C.
38 Willard and Henry A. Willard, their heirs or assigns, may at their option and election rebuild the tenements and buildings that may be so destroyed or rendered unfit for occupation as aforesaid and enable the said party of the second part, her executors or administrators, to resume the occupancy of said demised premises, it being expressly understood and agreed between the parties hereto that it shall in said event be at the option of said Joseph C. Willard and Henry A. Willard either to rebuild and then continue the said term or to end and terminate it, as they may prefer, on and after such loss and destruction by fire as aforesaid, and that the party of the second part shall have possession of said premises at the commencement of the term hereof and shall hold the same quietly and peaceably until the end of said term.

In testimony whereof all the parties have hereunto set their hands and seals the day and year first above written.

(Signed) J. C. WILLARD. [SEAL.]
(Signed) H. A. WILLARD. [SEAL.]
(Signed) PHŒBE D. COOK. [SEAL.]

39 For value received and in consideration of the sum of one dollar to me in hand paid by Orrin G. Staples, of Watertown, N. Y., the receipt whereof is hereby acknowledged; also in consideration of certain payments made and acts performed, as mentioned in a certain agreement made and executed by Phebe D. Cooke, of the first part, and O. G. Staples, of the second part, in which the said party of the first part agrees to sell and assign certain leases of Willard's Hotel from Messrs. J. C. and H. A. Willard: Now, therefore, in consideration of the above, I do hereby sell, assign, transfer, and set over unto Orrin G. Staples, of Watertown, N. Y., all my right, title, and interest in and to the leases of Willard's Hotel, in Washington, D. C., one made by Joseph C. Willard and Henry A. Willard to James H. Breslin and Joseph G. Cooke, bearing date October 26th, 1878, and the other made by said Willard to me, Phebe D. Cooke, bearing date May 8, 1883.

Dated July 23d, 1883.

(S'g'd) PHEBE D. COOKE. [SEAL.]

I consent to the within assignment.
Aug. 10th, 1883.

(S'g'd) H. A. WILLARD.

I consent to the within assignment.
Aug't 11th, 1883.
(S'g'd) J. C. WILLARD.

In presence of—
E. M. HARRIS.

Endorsed: Phebe D. Cooke to O. G. Staples. Ass't of leases.

40 *Deposition of H. K. Willard for Defendant. Filed April* 24, 1888.

In the Supreme Court of the District of Columbia. In Equity.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } No. 10945.

Be it remembered that pursuant to agreement on the fifth day of April, A. D. 1888, personally appeared before me, Albert Harper, an examiner in chancery of said court, the within-named Henry K. Willard, who, being produced as a witness of lawful age for and on behalf of the defendant, and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matter at issue in the above-entitled cause, deposes and says as follows:

41 THURSDAY, *April* 5, 1888—3 o'clock p. m.

Met pursuant to agreement.

Present: William F. Mattingly, Esq., solicitor for the defendant, also the examiner (Albert Harper), and Messrs. Morris & Hamilton, solicitors for the complainant.

HENRY K. WILLARD, *who* being produced as a witness of lawful age for and on behalf of the defendant, and being first duly sworn, deposes and says:

Direct examination by Mr. MATTINGLY:

Q. You are the complainant in this case?
A. Yes, sir.
Q. State your age, if you please.
A. Thirty-one years and six months nearly.
Q. This property was conveyed to you, I believe, in December?
WITNESS: The property in this case?
Mr. MATTINGLY: Yes.
A. Yes.
Q. The grantor in that deed was your father?
A. Yes, sir.
Q. Did you pay anything for it?

Mr. MORRIS: Solicitors for the complainant object to the
42 question as irrelevant.

A. The consideration is mentioned in the deed.

Q. Please state whether you paid anything for it or not.

A. I would refer you to Liber No. 1298, folio 33 *et seq.*, of the land records.

Q. Did you pay the pecuniary consideration named in that deed?

Mr. MORRIS: Same objection.

A. The deed will speak for itself. It is on record.

Q. Well, the deed does not answer that question. The question is, Did you pay the pecuniary consideration named in that deed?

Mr. MORRIS: Same objection.

A. I must again say that the deed speaks for itself. There have been numerous transfers of property from my father to myself. The deeds are all of record.

Q. Does that deed state the consideration for its execution by your father?

Mr. MORRIS: Same objection.

A. The deed states the truth.

Q. Have you collected the rents for the property since the execution of that deed?

A. Yes, sir.

Q. Have you turned those rents over to your father?

43 A. No, sir.

Q. Have you received them and applied them to your own personal use?

A. I have applied them to my own personal use by depositing them in bank to my own credit.

Q. Have you drawn out the funds thus deposited for the use of your father?

A. No, sir; not one cent for his use.

Q. Has he checked on that fund?

A. No, sir.

Q. Is there any understanding or agreement between you and your father upon which this property is held by you in any way for his use and benefit?

Mr. MORRIS: Objected to as irrelevant.

A. While I do not see the pertinency of the question to the case, still I am free to say that there is no secret understanding or trust.

Q. Do you mean to be understood as saying that this property is held by you absolutely for your own benefit and that your father has no interest in it whatever, either direct or indirect?

Mr. MORRIS: Same objection.

A. I am the *bona fide* owner of one-half interest in the property mentioned in the suit. My father has no interest in it whatever.

44 Q. Either directly or indirectly?

A. Neither directly nor indirectly.

Cross-examination by Mr. MORRIS:

Q. You are the only child of your father?
A. Yes, sir.

HENRY K. WILLARD.

Sworn to and subscribed before me this 5th day of April, A. D. 1888.

ALBERT HARPER, *Examiner.*

Mr. MATTINGLY: Testimony in behalf of the defendant is here closed.

ALBERT HARPER,
Examiner in Chancery.

45 I certify that the foregoing deposition (comprising four printed pages) was taken down by me in short-hand, as examiner in chancery, from the statements when and as uttered by the deponent thereof; that the same was thereafter transcribed by me into print and thereupon read and subscribed by the deponent thereof.

I further certify that my fee of $5.00 for taking, certifying, and returning said deposition has been paid to me by the defendant.

I further certify that I am not of counsel nor in anywise interested in this case.

ALBERT HARPER,
Examiner in Chancery.

46 *Decree for Sale. Filed Jul.* 7, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD, Complainant,
vs.
JOSEPH C. WILLARD, Defendant. } Equity No. 10945.

This cause coming on to be heard on the bill, answer, and testimony taken therein, and being argued by counsel and submitted to the court, it is, upon consideration thereof, adjudged, ordered, and decreed by the court, this 7th day of July, A. D. 1888, that the real estate and premises mentioned in the proceedings, to wit, lots of ground numbered one (1), two (2), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), in square numbered two hundred and twenty-five (225), in the city of Washington, in the District of Columbia, together with the buildings and improvements thereon, being the premises known as Willard's Hotel, be sold, and that Martin F. Morris and William F. Mattingly be, and they are hereby, appointed trustees to make such sale.

The course and manner of proceeding of said trustees shall be as follows: They shall first file in the clerk's office of this court each his several bond to the United States of America, with surety or

sureties to be approved by the court, in the penalty of one hundred thousand dollars ($100,000), conditioned for the faithful performance of the trust reposed in them severally by this decree or which may be reposed in them by any future order or decree in the premises.

They shall proceed to make sale of the premises, having first
47 given at least one month's previous notice inserted in some newspaper printed and published in the said city of Washington and such other notice as they may think proper of the time, place, manner, and terms of sale, which terms of sale shall be as follows: One-third of the purchase-money to be paid on the day of sale, one-third in one year, and one-third in two years thereafter, the deferred payments to bear interest at the rate of six per cent. per annum from the day of sale and to be secured to the parties in interest by good and sufficient mortgage upon the premises herein decreed to be sold, subject to the approval of this court, or if the trustees shall find it to be *the* for the best interest of all the parties and the purchaser shall so elect at the time of sale the whole of the purchase-money may be paid in cash.

And as soon as may be convenient after any such sale or sales the said trustees shall return to this court a full and particular account of the same, with an affidavit of the truth thereof and of the fairness of such sale or sales annexed; and on the ratification of such sale or sales by the court and on the payment of the purchase-money and securing thereof as aforesaid the said trustees, by a good and sufficient deed, to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of said property and to his or their heirs the property sold to him or them free, clear, and discharged of all claim of the parties to this cause and of any person or persons claiming from or through them; and the said trustees shall bring into this court the money arising on such sale or sales, and the notes and securities to be taken by them for the deferred portion of the purchase-money, if any, to be disposed
48 of under the direction of this court, after deducting therefrom the costs of this suit and such costs of sale as may be proper and such commission to the said trustees for the performance of their trust as may be allowed to them in the premises.

CHARLES P. JAMES, *J.*

Order Book 10, *Page* 394.

Supreme Court, District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } No. 10945.

The defendant, Joseph C. Willard, appeals from the decree passed herein at special term on the 7th instant to the court in general term. The clerk will please enter.

July 16, 1888.

WM. F. MATTINGLY,
Sol. for Def't.

Appeal as ordered entered by the clerk, '88, 7, 16.

Order Fixing Security for Supersedeas on Appeal. *Filed July* 16, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Equity No. 10945.

49 It is, this 16th day of July, A. D. 1888, ordered that the security for a supersedeas on appeal to the court in general term from the decree passed herein on the 7th instant be the individual bond of the defendant in the penal sum of one hundred dollars.

E. F. BINGHAM,
Chief Justice.

I consent to the foregoing.

M. F. MORRIS,
For Complainant.

Appeal Bond. *Filed July* 16, 1888.

In the Supreme Court of the District of Columbia.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Equity No. 10945.

Know all men by these preeents that I, Joseph C. Willard, am held and firmly bound unto Henry K. Willard in the penal sum of one hundred dollars; to the payment of which, well and truly to be made, I do hereby bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated this 16th day of July, A. D. 1888.

Whereas the above-bounden Joseph C. Willard has appealed to the court in general term from the decree pronounced herein on the 7th day of July, 1888:

50 Now, the condition of the above obligation is this: Should said Joseph C. Willard prosecute his said appeal with effect, then this obligation shall be void, but otherwise shall be of full force and virtue in law.

JOSEPH C. WILLARD. [SEAL.]

Approved:

E. F. BINGHAM,
Chief Justice.

Proceedings in General Term.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning first Monday, October 1, 1888.

MONDAY, *October* 1, 1888.

Present presiding: Mr. Chief Justice Bingham and Justices Cox, James, Hagner, and Merrick.

* * * * * * *

WEDNESDAY, *October* 17, 1888.

Session resumed pursuant to adjournment.

Present presiding: Chief Justice Bingham and Justices James, Cox, and Merrick.

51 HENRY K. WILLARD, Complainant, *vs.* JOSEPH C. WILLARD, Defendant. } Eq. No. 10945, Cal. 178.

Argued by Mr. Hamilton for complainant and Mr. Mattingly for defendant, and submitted to the court.

MONDAY, *October* 22, 1888.

Session resumed pursuant to adjournment.

Present: Mr. Chief Justice Bingham and Justices Cox, James, and Merrick.

* * * * * * *

HENRY K. WILLARD *vs.* JOSEPH C. WILLARD. } Eq. No. 10945, Cal. 178.

Opinion of court by Mr. Justice Merrick directing decree affirming decree of special term.

WEDNESDAY, *October* 24, 1888.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justices James and Merrick.

* * * * * * *

52 *Decree of General Term.*

HENRY K. WILLARD, Complainant, *vs.* JOSEPH C. WILLARD, Defendant. } Equity No. 10945.

This cause coming on to be heard in the general term of the court upon the appeal of the defendant, Joseph C. Willard, and being argued by counsel and submitted to the court, it is, upon consideration thereof, adjudged, ordered, and decreed by the court in general

term, this 24th day of October, A. D. 1888, that the decree rendered by the special term of the court in this cause on the 7th day of July, A. D. 1888, be, and the same is hereby, affirmed, with the costs of appeal to be taxed against the defendant.

E. F. BINGHAM,
Chief Justice.

Appeal to the Supreme Court of the United States.

TUESDAY, *December* 18, 1888.

Session resumed pursuant to adjournment.
Present presiding: Chief Justice Bingham and Justice James.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } Eq. No. 10945., Cal. No. 178.

And now comes the defendant, by William F. Mattingly, his solicitor, and prays the court that said defendant, Joseph C. Willard, may be allowed an appeal to the Supreme Court of the United
53 States from the decree passed herein at the present term, and that the penalty of the appeal bond, to operate as a supersedeas, may be fixed.

Whereupon it is, this 18th day of December, A. D. 1888, ordered that the defendant be, and he hereby is, allowed an appeal from said decree to the Supreme Court of the United States, and that the penalty of the appeal bond, to operate as a supersedeas, be, and the same hereby is, fixed at the sum of twenty-five thousand dollars.

E. F. BINGHAM,
Chief Justice.

Supersedeas Bond. Filed Dec. 20, 1888.

In the Supreme Court of the District of Columbia, the 20th day of December, 1888. In Equity.

HENRY K. WILLARD
vs.
JOSEPH C. WILLARD. } No. 10945.

In error.

Know all men by these presents that we, Joseph C. Willard and Joseph E. Willard, are bound unto the above-named Henry K. Willard in the sum of twenty-five thousand dollars, to be paid to the said Henry K. Willard, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors,
and administrators, firmly by these presents.
54 Sealed with our seals and dated this 18th day of December, 1888.

Whereas the above-named Joseph C. Willard has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Joseph C. Willard shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOSEPH C. WILLARD. [SEAL.]
JOS. E. WILLARD. [SEAL.]

Sealed and delivered in presence of—
WALTER CARTER.

Approved:
E. F. BINGHAM,
Chief Justice.

55 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 9th day of January, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 9th day of January, 1889.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 9th day of January, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 1484. Joseph C. Willard, appellant, *vs.* Henry K. Willard. Filed January 12, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1484.

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY K. WILLARD.

Appeal from the Supreme Court of the District of Columbia.

MOTION TO DISMISS APPEAL.

The appellee, Henry K. Willard, by M. F. Morris, his solicitor and counsel, comes and moves the Court to dismiss the appeal taken in the above-entitled cause, and for grounds of this, his motion, he says that no appeal lies in said cause to this Court, and this Court is without jurisdiction to hear such appeal.

And further, for the reason that the appellee believes that the appeal so taken is frivolous and merely intended for delay, he moves that, in the event that the Court should determine that it has jurisdiction in the premises, the decree below should be affirmed.

M. F. MORRIS,
Solicitor and of Counsel for Appellee.

BRIEF IN SUPPORT OF MOTION.

1.

This suit is one for partition of real estate in the city of Washington under the act of Congress of August 15, 1876 (19 Statutes, p. 202), which act is as follows:

Be it enacted, &c., That all tenants in common and coparceners of any estate in lands, tenements, or hereditaments, equitable as well as legal, within the District of Columbia, may, in the discretion of the court, be compelled in any court of competent jurisdiction to make or suffer partition of such estate or estates. In proceedings for partition all persons in interest shall be made parties in the same manner as in cases of equity jurisdiction, and in proceedings for partition under this act the court may, in addition to the powers herein conferred, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court.

SEC. 2. That the court, in all cases in decreeing partition, may, if it satisfactorily appears that said lands and tenements or any estate or interest therein cannot be divided without loss or injury to the parties interested, decree a sale thereof and a division of the money arising from such sale among the parties, according to their respective rights and interests.

SEC. 3. That in all such sales, unless the court shall by special order direct or require, on good cause shown, that the sale be made for cash, the purchase money shall be payable, one-third on the day of sale, one-third in one year, and one-third in two years thereafter, with interest, the deferred payments to be secured to the parties according to their respective interests by good and sufficient mortgage upon the premises so sold, which shall be subject to the approval of the court.

The property in controversy is that known as "Willard's Hotel," in the city of Washington, occupying lots 1, 2, 12, 13,

14, 15, and 16, in square No. 225; and the appellant and appellee are the owners of it as equal tenants in common. The appellee, as complainant in the court below, filed his bill for a partition of it, and for a sale for the purpose of partition, if specific partition were inexpedient. The appellant resisted the partition on the ground that no reason was shown for the exercise of the discretion of the court, and because, as he alleged, the court was without jurisdiction to deprive him of his interest in the property either by partition of it in severalty or by sale.

Testimony was taken from which it appeared that it would be for the best interest of the parties that the property should be sold as a whole for the purpose of partition and the proceeds of sale divided; and the property was shown to be worth more than $600,000.

The supreme court of the District of Columbia in special term decreed a sale; and the general term affirmed the decree. From this decision the present appeal has been taken.

2.

That the appeal is causeless and unreasonable is perfectly apparent; since common sense and the peace of the community demand that when tenants in common disagree about their holding they should separate their interests and hold them in severalty. But more than that, there is no appeal allowable in this case.

In the first place the act of Congress itself does not authorize an appeal. In the second place the appeal is not authorized by any general law.

The rule of law is that where the jurisdiction of an inferior tribunal already existing is merely enlarged, an appeal will be to this court (*ex parte Zellner*, 9 Wallace, 244); but that, when a new or additional jurisdiction is conferred which did not exist before, no appeal will lie unless it is expressly given.

U. S. *vs.* Nourse, 6 Peters, 470, 494.
U. S. *vs.* More, 3 Cranch, 170.

The jurisdiction given by the act of Congress of August 15, 1876, to the supreme court of the District of Columbia was a new jurisdiction which did not exist before. It was not an enlargement of an existing jurisdiction, but the creation of an entirely new power in the court.

It is very true that ever since the statute of 32 Henry VIII authorizing specific partition between joint tenants and tenants in common, courts of equity have exercised the power of making such partition, and that statute always has been in force in the District of Columbia; but that statute only authorized specific partition, and prior to the act of August 15, 1876, there was no law in force in the District of Columbia authorizing the sale of real estate for the purpose of partition, except in the single instance of property vested under the statute of descents, where the parties entitled to the estate could not agree upon a partition of it, or where there was a minor interested (Maryland Act of Descents of 1786, chap. 45, sec. 8). The act of Congress of August 15, 1876, for the first time conferred upon the court of equity in the District of Columbia the power of decreeing a sale of real estate for the purpose of partition.

It is plain that this was a new power, and not the enlargement of an existing power; and it is plain that Congress itself in passing the act so considered it, inasmuch as it specifies the power conferred to be *in addition to the general equity jurisdiction of the court.*

3.

That the act of August 15, 1876, not only contemplated no appeal to this Court, but quite the reverse, is evident not only by its failure to give such appeal in express terms, but likewise from the fact that the power granted by it to the supreme court of the District of Columbia is in terms *discretionary.* The provision is that parties "may, *in the discretion of the court*, be compelled to make or suffer partition." And discretionary power in its nature is not subject to review in an appellate tribunal, except for an abuse of it.

Analogous in this respect to the matter of partition, or sale for the purpose of partition, is the jurisdiction conferred by the laws of Congress on the supreme court of the District of Columbia to grant divorces. There is no appeal to this court in divorce cases adjudicated in this district; and the general jurisdiction would apply to the one as well as to the other.

4.

The appellate jurisdiction of this court over the supreme court of the District of Columbia is specifically limited by law to cases "where the matter in dispute, exclusive of costs, exceeds the value of one thousand dollars," (Revised Statutes, sec. 705,)—the limit of value being made $5,000 by the act of Congress of March 3, 1885 (23 Statutes, p. 443).

Now, there is here no matter in dispute of any pecuniary value. There is nothing of money value claimed by one party from the other. Each party is entitled as tenant in common to an undivided one-half interest in certain property. Each party is entitled to have that one-half interest set off to him in severalty. If that cannot be done specifically without loss, each party is entitled to a conversion of the property into money, and to have one-half of the money set off to him in severalty. There is no money, and nothing of money value, to be transferred from one party to the other; and consequently there is nothing of money value in dispute. This court, therefore, has no jurisdiction; and the appeal should be dismissed.

5.

It is plain that the appeal is merely frivolous and for delay. The only thing in the defendant's answer to the bill of complaint that has the semblance of substance to it is the sixth paragraph, in which he says: "I respectfully charge and aver that it is not within the power of the court to de-

prive me, against my will and without my consent, of my interest and estate in the whole of said property, either by a partition in severalty or by a sale thereof." And so the defense seems to be that the court can not do,—what courts of equity have been constantly doing without question since 32 Henry VIII—that is, decree a specific partition of real estate so that several tenants in common shall have their exclusive interests set apart to themselves in severalty; or that it can not do, what courts of equity are now authorized to do in every State and Territory of the Union—that is, decree a sale and the partition of the proceeds, where a specific partition is inexpedient for the interest of the parties. As well might he attack the Bill of Rights or the Declaration of Independence.

6.

The character of this appeal is further shown, and further corroboration is given to the proposition already stated that no appeal is given or was intended to be given in such cases, by a reference to the consequences that will follow its allowance. These consequences are that the property must remain vacant and unoccupied while the appeal is pending—for it is not probable that the parties could or would consistently concur in utilizing it during that period; and it is not a case where the court could properly intervene by a receiver or otherwise to utilize it for them; that there must, therefore, be loss of rent to the parties for three years at least, and all the deterioration necessarily consequent upon the absence of use and occupation. The property is shown to be worth about $660,000. Its gross rental value can not be much less than $50,000 a year. All this will be lost to the parties; and the pecuniary loss by deterioration will scarcely be much less. The sum of $150,000 will not be greatly more than sufficient to reimburse the appellee for all such loss if he is compelled to suffer it. It is no answer to this that the appellant must suffer equal loss. If the appellant, through

wantonness or malice or some inscrutable motive, is willing to put the appelle to the loss necessarily incident to this delay, it is no compensation to the appellee that his co-tenant suffers equal pecuniary loss.

7.

It is respectfully submitted, therefore, that either this appeal should be dismissed or the decree should be affirmed.

M. F. Morris,
For Appellee, Henry K. Willard.

FILED
JAN 26 1889
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

JOSEPH C. WILLARD, Appellant,
vs.
HENRY K. WILLARD. } No. 1,484.

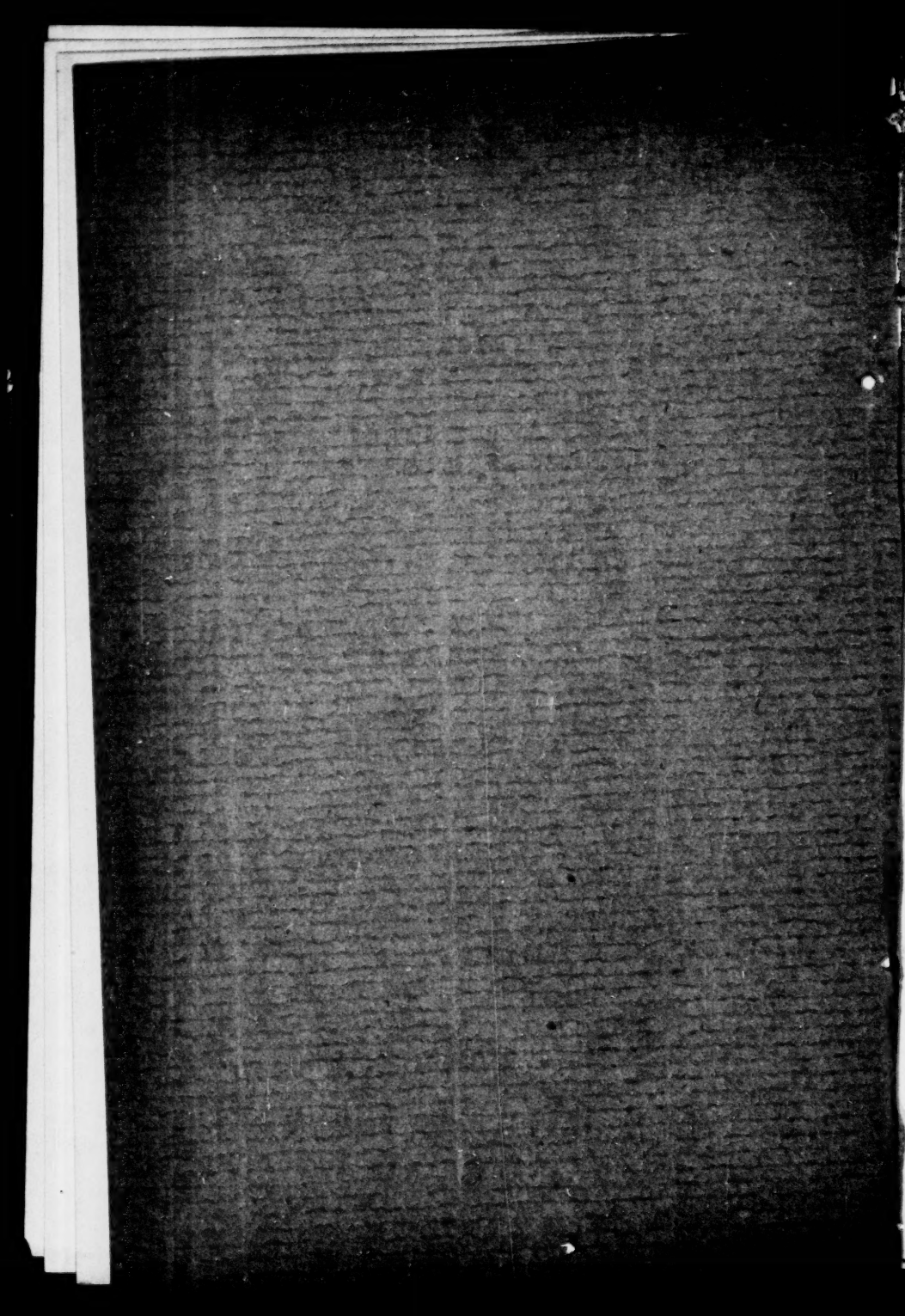
Appeal from the Supreme Court of the District of Columbia.

BRIEF OF APPELLANT

On Appellee's Motion to Dismiss Appeal for Want of Jurisdiction.

W. F. MATTINGLY,
Counsel for Appellant.

LAW REPORTER PRINT, 503 E ST.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1888.

JOSEPH C. WILLARD, APPELLANT,
vs.
HENRY K. WILLARD. } No. 1,484.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF APPELLANT

On Appellee's Motion to Dismiss Appeal for want of Jurisdiction.

The decree in this cause was passed by the Court below on October 25, 1888. The appeal was allowed on December 18, 1888, and a duly approved *supersedeas* bond in the sum of $25,000 was filed on December 20, 1888.

This motion is a most extraordinary one.

A bill for partition of a large piece of real estate is filed in the Court below by the owner of one undivided moiety against the owner of the other undivided moiety. The property is worth at least $600,000. The Court below decrees a sale of the property, and says to the defendant your property shall be sold against your will, and you shall accept instead of the property one-half of the proceeds of whatever we may sell it for. He appeals to this Court from the decree, and the appellee gravely says that this Court has no jurisdiction to entertain said appeal.

First.

Because the Act of Congress of August 15, 1876, under which the proceedings were had, does not authorize an appeal, and that it is not authorized by any general law.

It is true that this act, as well as every other act passed by Congress every year, under which the Court below is called upon to act, does not in express terms say that the parties shall have the right to appeal to this Court.

But Sec. 846 of the Rev. St. D. C. provides that "any final order, judgment or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the circuit courts of the United States."

Section 847 provides that the matter in dispute must be of the value of $1,000 or upward, exclusive of costs. This section was changed by Act of March 3, 1885, (23 U. S. St., 443) and the jurisdictional amount fixed at $5,000, exclusive of costs.

In 19 Wall., 62, R. R. Co. *vs.* Church, this Court had the same question before it in a much stronger case against the right to appeal. The R. R. Co. had sued out a writ of error to the Supreme Court of the District of Columbia on a judgment confirming the inquisition of a marshal's jury assessing damages against the R. R. Co. for the use by it of a street in front of the Church of the defendants in error. The proceedings before the marshal and jury were governed by a statute of Maryland, which, as construed by the courts of that State, did not allow an appeal or writ of error. The defendants in error moved to dismiss the writ for want of jurisdiction in this Court. This Court denied the motion on the strength of the language of the act of Congress conferring the jurisdiction, being the same as in Sec. 846, Rev. St. D. C., recited above. In the opinion, delivered by Mr. Justice Miller, is cited with approval the language of

the Court, referring to the same act of Congress, in 4 Cranch, 384, Young *vs.* Bank of Alexandria, as follows: "*The words of the act of Congress, being as explicit as language can furnish, must comprehend every case not completely excepted from them.*"

In 116 U. S., 172, Smith *vs.* Whitney, the opinion of the Court, delivered by Mr. Justice Gray, states, "The final judgment or decree of the Supreme Court of the District of Columbia *in any case* in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, may be reviewed and reversed or affirmed in this Court, upon writ of error, if the judgment is at law, or upon appeal, if the decree is in equity."

In Vigo's Case, 21 Wall., 649, adjudicated by the Court of Claims, under authority of a special act of Congress, which did not in terms confer any right of appeal, this Court held "that Congress intended to refer the claim to the Court for judicial determination and to confer special power and jurisdiction for that purpose. Such being the case the right of appeal necessarily follows."

There are three cases relied upon by the appellee, cited in his brief.

1st. *Ex parte* Zellner, 9 Wall., 244.

This case is clearly in our favor. The Court (p. 247), referring to the Circuit and District Courts, says: "The jurisdiction of both these Courts has been enlarged from time to time since this organization; and it has never been doubted but that the judgments or decrees *founded upon these new subjects of jurisdiction* were liable to the operation of these general provisions in respect to writs of error and appeals."

2d. U. S. *vs.* Nourse, 6 Pet., 470.

This was a case of special and summary jurisdiction, in which the mode of proceeding is particularly pointed out, and in which a special mode of taking an appeal is prescribed.

This case is referred to in the opinion in the Zellner Case, *supra*, p. 247.

3d. U. S. *vs.* More, 3 Cranch, 170.

This was a criminal case, in which the Court decided that the right of appeal applied only to civil cases.

Second.

The next objection to the right to appeal is because the statute provides that the parties "may in the discretion of the Court, be compelled to make or suffer partition;" and discretionary power is not subject to review in an appellate tribunal. I cannot suppose that the learned counsel for the appellee has any confidence in this objection. So far as any discretion is conferred upon the Court by the statute it is a judicial discretion, controlling and entering into its final decree, and therefore under all decisions clearly appealable.

The learned counsel says that the jurisdiction of the Court below in divorce cases is analogous, and that no appeal lies in such cases, although the general jurisdiction would apply to the one as well as the other. The simple answer to this is, that Congress in limiting the general appellate jurisdiction of this Court by stating in what cases an appeal to it may be taken, has not seen fit to measure the personal liberty or happiness of the citizen by a pecuniary standard, and I presume that if any decree of the Court below, even in a divorce case, affected any property right of a party of the value of more than $5,000, an appeal to this Court would lie, certainly from so much of the decree as affected the property.

Third.

The appellee says that there is no matter in dispute here exceeding the value of $5,000. His argument upon this point is more specious than sound. It is patent that the

matter in dispute is the sale under the decree of real estate worth at least $600,000, and that this decree takes one-half of this real estate from the defendant and converts it into personalty without his consent. The matter in dispute, whether it be the whole or one-half the property, exceeds the jurisdictional amount by several hundred thousand dollars.

Fourth.

But the counsel for the appellee anticipating the decision of the Court that it has jurisdiction of the appeal, also moves the Court to confirm the decreee below, because he says, "It is plain that the appeal is merely frivolous and for delay," and he sets up a single clause of the answer as the easiest pin for him to bowl down. It ought be a sufficient answer to assert that it is plain from the record that this appeal is not frivolous and was not taken for delay. It was taken in good faith and in the belief that the decree was contrary to law.

I do not suppose that on this motion the Court desires any argument upon the merits of the case or analysis of the evidence. But I will briefly present some of the questions to be argued when the case is heard upon its merits.

Aside from any question of power in the Court below under the statute, to sell a man's property against his will, not in the enforcement of any lien or contract right, it is a familiar principle of law that the owner of a reversionary interest in real estate, although it be after a lease for years, has not the right to demand a partition. See Freeman on Co-tenancy and Partition, secs. 440, 441.

Also 6 Cush., 474, Hunniwell *vs.* Taylor, which was a reversion after a lease for years, which expired pending the litigation. In the opinion the Court says, "In the present case the petitioner having at the time of profering his petition no present right of entry or possession, but only the reversion after the expiration of the leases for years, cannot

maintain the petition. Whether the term for years be long or short cannot affect the principle. The fact that the leases have now expired cannot affect the rights of the parties, which must be determined upon the facts as they stood when the process was instituted."

In the case at bar the answer and the proofs show that the property was under lease, and still is, at a remunerative rental, and that the owners of the fee have but a reversionary interest after the expiration of the lease.

Another important question for argument in this case is this:

The Act of August 15, 1876, does not grant to a tenant in common the absolute right to a partition, but leaves it to the discretion of the Court. There is not a single averment in the bill nor a scintilla of proof in the testimony as a basis for the exercise of the discretion of the Court, but it is demanded solely as a matter of right upon the single allegation of common ownership. The property was owned by Henry A. and Joseph C. Willard, who had leased it to a tenant. Henry A. gave and conveyed his interest to his son, Henry K. Willard, who immediately thereupon filed this bill. There is no averment and no proof that he requested his co-tenant to unite in a partition or sale, or that he could not sell his interest for the full half value of the property, or of any disagreement or want of concord in the management of the property.

Again, it is manifest from the location, bounded by three streets, quantity of land and character of the improvements, that the property could be divived in severalty between the two owners.

Fifth.

The Court is asked by the appellee to decide this motion upon what he alleges will be the consequences of delay pending the appeal.

He assumes that the two owners of this valuable prop-

erty will be so short-sighted as to permit it to remain idle pending the appeal after the expiration of the pending lease, and asserts that "it is not probable that the parties could or would consistently concur in utilizing it during that period."

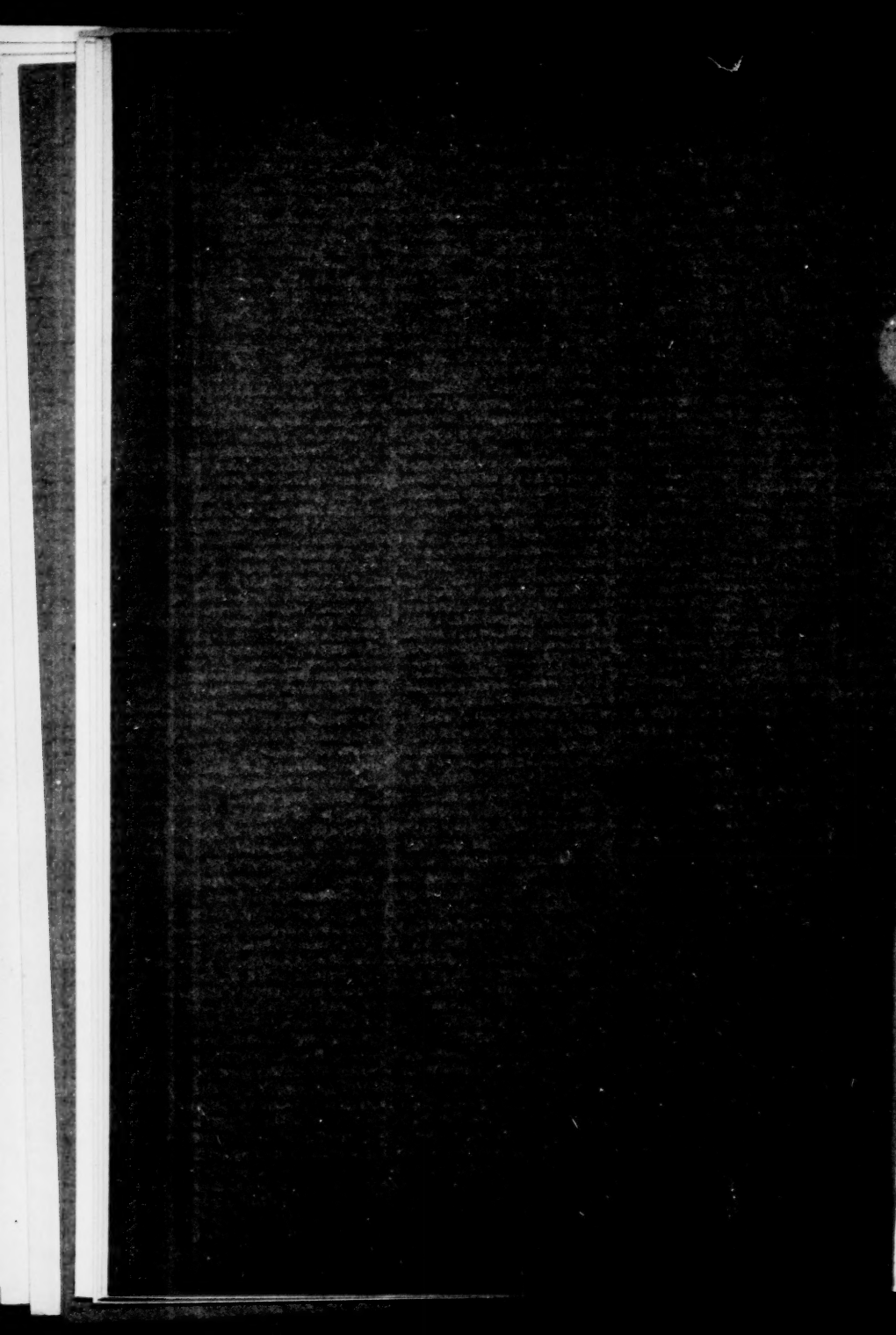
In this I assume he is speaking for himself. But if he has made up his mind not to agree to utilize the property upon the expiration of the pending lease during the appeal, I submit that he ought not to seek to hold the appellant responsible for the consequences.

He also suggests that he would oppose the appointment of a receiver by the Court below in asserting that "it is not a case where the Court could properly intervene by a receiver or otherwise to utilize it for them." In the total absence of a single word in the pleadings and proofs to justify or excuse it, he says that "if the appellant, through wantonness or malice or some inscrutable motive, is willing to put the appellee to the loss necessarily incident to this delay, it is no compensation to the appellee that his cotenant suffers equal pecuniary loss."

I assume that this Court will not, in the entire absence of any such allegation or proof, presume as matter of law that the appellant will be actuated by any such motives and act so contrary to his own interests. All these statements of the appellee are wholly foreign and irrelevant to the questions involved in the motion, and are thus noticed because the suggestions implied in them are deemed unworthy the dignity and impartiality of the Court.

Respectfully submitted.

WM. F. MATTINGLY,
Solicitor for J. C. Willard, appellant.



Supreme Court of the United States.

No. 318. October Term, 1891.

JOSEPH C. WILLARD, Appellant,

vs.

HENRY K. WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Statement of the Case.

Prior to December 1, 1887, Henry A. Willard and Joseph C. Willard were the owners as tenants in common in fee simple of certain lots in Square No. 225 in this city, known as Willard's Hotel; and had been such owners for upwards of twenty-five years. The property has a large frontage on three streets, viz., Pennsylvania avenue, Fourteenth and F streets, and in the aggregate over 33,000 square feet of land. On December 1, 1887, Henry A. Willard conveyed his undivided moiety of the property to his son, Henry K. Willard, by voluntary conveyance. On January 3, 1888, Henry K. Willard filed his bill against his co-tenant, Joseph C. Willard, setting forth that they owned the property as tenants in common. That he, the complainant, desired to have a partition of said real estate, and if in the opinion of the court the property could not be specifically divided and partitioned between the parties

without loss and injury to them and to the purposes for which said real estate and premises are used, he desired that for the purpose of partition, the same may be sold and the proceeds divided between him and the defendant. The defendant in his answer claimed that he should not be compelled to suffer partition.

At this time the property was under a lease which did not expire until May 1, 1889, at a net rent of $20,500 per annum, exclusive of all taxes, assessments and other charges.

The testimony introduced by the complainant (the defendant offered none) shows that the property as a whole is worth over $600,000; that it could be divided in kind (Rec., 8, 10, 12 and 14), but that to do so would be at a loss, and that it would sell for more if sold as a whole. That as a whole it is a very desirable site for a hotel, for which it has been used for a great many years.

The bill was filed under the Act of Congress of August 15, 1876 (19 Stat., p. 202), which act is as follows:

> *Be it enacted, &c.*, That all tenants in common and coparceners of any estate in lands, tenements, or hereditaments equitable as well as legal, within the District of Columbia, *may, in the discretion of the court*, be compelled in any court of competent jurisdiction to make or suffer partition of such estate or estates. In proceedings for partition all persons in interest shall be made parties in the same manner as in cases of equity jurisdiction, and in proceedings for partition under this act the court may, in addition to the powers herein conferred, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court.
>
> SEC. 2. That the court, in all cases in decreeing partition, may, if it satisfactorily appears that said lands and tenements, or any estate or interest therein, cannot be divided without loss or injury to the parties interested, decree a sale thereof and a division of the money arising from such sale among the

parties, according to their respective rights and interests.

SEC. 3. That in all such sales, unless the court shall by special order direct or require, on good cause shown, that the sale be made for cash, the purchase money shall be payable, one-third on the day of sale, one-third in one year, and one-third in two years thereafter, with interest, the deferred payments to be secured to the parties according to their respective interests by good and sufficient mortgage upon the premises so sold, which shall be subject to the approval of the court.

The court passed a decree for the sale of the property for the purpose of partition.

ASSIGNMENT OF ERRORS.

The decree below is alleged to be erroneous, because—

1st. The property was under lease for a term of years at the time the bill was filed, and complainant not entitled to possession.

2d. Because under the Act of Congress of August 15, 1876, a tenant in common has not an absolute right to partition, but it is discretionary with the court, and something besides the existence of the tenancy must be averred and shown in order to call such discretion into exercise, which was not done in this case.

GENERAL PRINCIPLES OF THE LAW OF PARTITION.

At common law, coparceners alone had the right to demand partition. By the Statute of 31 Henry VIII, this right was extended to joint tenants and tenants in common of estates of inheritance, and by 32 Henry VIII to estates for life or years, and estates held in a different manner by

different tenants. The proceeding to obtain partition was at law, and was a partition of the property in kind. The courts had no authority to compel a sale of the property.

17 Am. and Eng. Enc. Law, 678.

Freeman, Sec. 421–422.

THE LAW IN THE DIFFERENT STATES.

As the right to the partition of the property itself at common law and under these Statutes of Henry VIII, was deemed absolute and its enforcement frequently led to harsh and disastrous results, England and the different States in this country enacted laws by which under certain circumstances the property could be sold and the proceeds divided. Different provisions prevail in different States. In some a sale will be decreed "when partition cannot be made without great inconvenience:" "when a sale is best for the interest of the parties:" "when a sale will best promote the interest of the parties;" "when the lands cannot be divided without loss or injury to the parties interested," and so on. In some States commissioners are appointed to appraise the property and if one of the parties is willing to take it at the appraisment he is permitted to do so. If two or more so offer, or if none offer, a sale is ordered. Or sealed bids will be received by the court from the owners for amounts above the appraised value and the highest bidder takes the property. Freeman, Sec. 537, 541.

The right to a sale depends altogether upon the Statute and will only be directed when the facts and circumstances required by Statute to authorize it are affirmatively made to appear. The onus is always on him who seeks a sale. Am. & Eng. Enc., 786. Freeman Sec. 537.

THE LAW IN THIS DISTRICT.

Prior to the passage of the Act of Congress under which this bill is filed, there were two acts of the Assembly of the

State of Maryland, in force in this District, under which real estate could be sold for purposes of partition. First, the Act of 1785, chapter 72, section 12, which provides that in case any infant, idiot, or person non compos mentis has a joint interest or interest in common with any other person or persons, in equal or unequal proportions in any lands, tenements or hereditaments, and it shall appear to the chancellor upon application of any of the parties concerned, and on hearing and examination of all the circumstances, that it will be for the interest and advantage both of the infant, idiot, or person non compos mentis, and of the other person or persons concerned, to sell such lands, tenements or hereditaments or any part thereof, the chancellor may order and direct such land, tenements or hereditaments, or any part thereof, to be sold upon such terms as the chancellor shall direct.

The next is the act to direct descents of November, 1786, chapter 45, section 8, which provides that in case the parties entitled to the intestate estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission of five discreet and sensible men, to adjudge and determine whether the estate will admit of being divided without injury and loss to all the parties entitled, and to ascertain the value of such estate in current money, and if the estate can in the opinion or judgment of the Commissioners or a majority of them be divided without loss or injury to all the parties entitled, that they will then divide and make partition of the same, fairly and equally in value to all the parties interested according to their several just proportions, and if the Commissioners or a majority shall determine that the estate cannot be divided without loss to all the parties, then they shall make return to the county court of their judgment and the reasons upon which the same is formed, and the real value of the estate

in current money, and if the judgment of the Commissioners be confirmed by the county court, then the eldest son, child, or person entitled, if of full age, shall have election to take the whole estate, and pay to the others their just proportions of the value in money, and if the eldest child or person entitled refuses to take the estate and pay then they next shall have the right of election so to take, and so on, and if all refuse to so elect to purchase, the estate shall be sold, under the direction of the said Commissioners or the majority of them, for money or upon credit. And the purchase money shall be justly divided among the several persons interested according to their respective titles to the estate; but if all the parties entitled shall be minors on the death of the intestate, the estate shall not be sold until the eldest arrives to age.

These acts will be found in 2d Kilty's Laws of Maryland. Subsequent to the cession of this District in February, 1801, by the State of Maryland, the Legislature of that State by the Act of 1831, chapter 311, section 7, extended the provisions of the above Act of 1785 to parties of full age who have an interest or estate jointly or in common or otherwise concurrently in or out of any lands, tenements or hereditaments.

Referring to these two acts of Maryland of 1785 and 1831, the Court of Appeals of that State in 2d Maryland Chancery Decisions, 13, Mewshaw *vs.* Mewshaw, decided that to give the court jurisdiction under these acts the bill should allege that a sale would be for the advantage of the parties, and the allegation must be established by admission if the parties are of age, or by evidence if not of age, and if so established the court has power to decree a sale.

Prior to the Act of 1876 it was never claimed in this jurisdiction that, where the parties were all adults, the court could decree a sale. The question, if it was one, was early decided. 3 Cr. Ct. Ct., 323. Hastings *vs.* Granberry.

Points in this Case.

FIRST.

The property at the time the bill was filed being in the possession of a tenant under a lease for years, complainant had a merely reversionary interest, and not being entitled to the possession had no right to demand partition.

The bill was filed January 3d, 1888. Decree of Court at Special Term was passed July 7, 1888, and confirmed by the Court in General Term October 24, 1888.

The lease for years (Rec. 18) expired May 1 1889.

Freeman on Co-tenancy and Partition, Sec. 446, says:

> It is a general rule prevailing in England without exception, and also throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co tenants thereof. Therefore, the grantee of a deed in which the grantor reserves the right to remain in possession during his natural life cannot maintain a suit for a compulsory partition. So it was held that a tenant in common of lands whose moiety was held by a tenant under lease had no right to demand partition, although the applicant was tenant in common of the rents as well as of the reversion. But probably the weight of the authorities is the other way, and in favor of the rule that notwithstanding a lease for years, a co-tenant both of the rents and of the reversion may call for a partition.

The only cases cited by the learned author in support of his opinion as to the probable weight of authority are 5 Paige, 518—Woodworth *vs.* Campbell, and 19 Minn., 172—Cook *vs.* Webb. The case in 5 Paige is very briefly and unsatisfactorily reported. In the Minnesota case the court

bases its opinion upon the express language of the statute of that State which authorizes partition between remaindermen as well as those having reversionary interests. It states that the law of that State is different from that of other States.

In 6 Cush., 474, Hunniwell *vs.* Taylor, which was a case of reversion after a lease for years, which expired pending the litigation, in its opinion the court says:

> In the present case the petitioner having at the time of proffering his petition no present right of entry or possession, but only the reversion after the expiration of the leases for years, cannot maintain the petition. Whether the term for years be long or short cannot affect the principle. The fact that the leases have now expired cannot affect the rights of the parties, which must be determined upon the facts as they stood when the process was instituted.

34 Vt., 526, Baldwin *vs.* Aldrich: Partition will not be made where one tenant in common, is a sole licensee, and as such entitled to the exclusive possession of part of the land.

3 Vt., 207, Hubbard *vs.* Ricart: Heirs are not entitled to partition while the lien of the administrator, for the payment of debts, remains upon the land; but in the absence of proof, such lien shall be presumed satisfied, after two years.

The court below, in 6 Mackey, 165, Moore *vs.* Shannon, referring to the Act of 1876, said:

> The general rule, at the passage of that statute, unquestionably was, that one in remainder or reversion could not have partition during the possession of the life tenant.

And (page 167):

> It is still, notwithstanding the Act of 1876, indispensable to his right to institute such proceedings, that he shall be actually seised or in possession of whatever estate he may claim to be entitled to.

In this case, the widow was in possession under an assignment of dower.

The principal reason for the rule is that at the expiration of the particular estate, whether for life or years, the condition of the property or the parties may be greatly changed. The rule is universally conceded in the case of a life tenant in possession, and applying the logic for the existence of the rule, it is impossible to discriminate between the case of a tenant for life and one for years. This was so recognized in the case in 6 Cush., *supra*.

SECOND.

Under the Act of Congress, partition is not a matter of right, but in express terms is made discretionary with the court; and the simple averment of a tenancy in common is not sufficient to justify a decree.

It has already been shown that the right to a partition in this case depends solely upon the statute.

We claim that something more must be averred and shown than the mere fact of tenancy in common. There is not a single averment in the bill, nor a scintilla of proof in the testimony as a basis for the exercise of the discretion of the court, but it is demanded solely as a matter of right upon the single allegation of common ownership. The property was owned by Henry A. and Joseph C. Willard, who had leased it to a tenant. Henry A. gave and conveyed his interest to his son, Henry K. Willard, who immediately thereupon filed this bill. There is no averment and no proof that he requested his co-tenant to unite in a partition or sale, or that he could not sell his interest for the full half value of the property, or of any disagreement or want of concord in the management of the property.

What is the meaning of the wording of the statute "may, in the discretion of the court be compelled to make or suffer partition?"

The words are there, and it is the duty of the court to give them some intelligent meaning, if they are susceptible of any. If the simple fact of a common ownership was intended by Congress to give one of the owners the absolute right to a partition, why does the act say that although there may be a tenancy in common or coparcenary, yet the court may or may not, in its discretion, decree a partition.

Is not the proper construction of the act substantially this: That if, upon inquiry into all the circumstances of the case, a court of equity sees that, having a due regard to the rights and interests of all parties, the property ought to be partitioned, it will so decree; and, on the other hand, that if right and justice do not so require, it will not so decree.

Is not this construction fortified by the second section of the act? Is not the meaning of the second section this: If the court, in the exercise of its discretion under the first section, comes to the conclusion, under all the circumstances of the case, that it is a proper case in which to decree partition, then, if it satisfactorily appears that the property cannot be divided without loss or injury to the parties interested, the court may decree a sale and a division of the proceeds.

A complainant can only recover according to his averments and proofs, and unless under this statute every tenant in common has an absolute right to a partition, no matter what the circumstances may be, then the complainant must aver facts in his bill which would justify the court in the exercise of a judicial discretion, to decree partition. He must, under all the authorities, bring his case within the provisions of the statute on the face of his bill; and, if the statute, notwithstanding the tenancy in common, gives the court a discretion to partition or not, then facts must be averred and proved which will afford the court information upon which it can exercise its discretion. If no such facts appear, then there is nothing upon

which the court can be called upon to act. We respectfully submit that this is the only safe and proper rule of construction, and the one intended by Congress in making the relief sought permissive, (not mandatory,) and discretionary with the court.

We further submit that it is a serious matter to a man advanced in years, having a fortune invested in a piece of real estate, yielding a fair income and increasing in value, for a court, at the demand of a co-owner who comes in as a mere volunteer, to say, we will sell this property, convert your real estate into money, or promises secured by mortgage on the property, whether you wish it or not.

If Congress had intended such to be the law it would have said "all tenants in common and coparceners in lands *shall be compelled* to make or suffer partition," and not "may in the discretion of the Court" be so compelled.

It is respectfully submitted that the decree below should be reversed and the bill dismissed.

WM. F. MATTINGLY,
Counsel for Appellant.

APR 11 1892
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 318.

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY K. WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for the Appellee.

M. F. MORRIS,
G. E. HAMILTON,
For Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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I.

STATEMENT OF CASE.

This is a suit in equity for the partition of real estate, and for a sale and the division of the proceeds in the event that specific partition should be found to be detrimental to the interests of the parties. The court below decreed a sale, and from that decree the defendant, Joseph C. Willard, has appealed.

The suit was instituted by the appellee, Henry K. Willard. It appears that the appellant and appellee were and are

owners, as tenants in common, of the property, in the city of Washington, in the District of Columbia, known as "Willard's hotel" and "Willard's hall," adjoining the hotel, comprising lots one, two, twelve, thirteen, fourteen, fifteen, and sixteen, in square No. 225, with the buildings thereon. The appellant, Joseph C. Willard, and Henry A. Willard, the father of the appellee, had owned the property together for many years, but Henry A. Willard had in A. D. 1887 conveyed his interest in it to his son and only child, the appellee, Henry K. Willard. Henry K. Willard brought this suit in A. D. 1888 to procure partition.

The bill, after having set forth the title of the parties, simply alleged that the complainant desired to have his share of the property set forth to him in severalty, and prayed the court to make specific partition between them, if it could be properly done, but sought a sale in the event that, in the opinion of the court, specific partition could not be had without injury to the parties in interest. (Rec., pp. 1, 2.)

The appellant, who was the defendant below, resisted the application, averred that he and Henry A. Willard had held the property in fee simple as tenants in common for many years; that for twenty-five years and upwards it had been leased and used as a hotel, and was then under lease at a remunerative rental; that, if the appellee had acquired title to the property, of which he demanded proof, he merely held under a secret trust for his father, Henry A. Willard, who was therefore a necessary party to the suit, and he denied that it was within the power of the court to enforce either partition in severalty or a sale for the purpose of a division of the proceeds. (Rec., pp. 3, 4.)

Issue was joined and testimony was taken. The deed of conveyance from Henry A. Willard to the appellee was proved; and it was also shown conclusively that Henry A. Willard had no longer any interest whatever in the property. (Rec., pp. 7, 15, 21, 22.)

Four of the most prominent dealers in real estate in the District of Columbia were called by the complainant as witnesses, and they were all unanimously of opinion that specific partition would be injurious to the interest of the parties; that the property should be sold in bulk, and that any other mode of division would result in a loss of $40,000 or $50,000 (Rec., pp. 7, 8). This there was no serious effort on the part of the appellant to controvert. He only sought in cross-examination to show, what no one denied, that it was physically possible to make specific partition of the property.

The complainant also produced and offered in evidence the existing lease of the property, to which the defendant had referred in his answer, and which then had about a year to run. (Rec., p. 17.)

The testimony on behalf of the defendant was confined to an abortive effort to show by the complainant himself, whom he called for the purpose, that the complainant had paid nothing for the conveyance of the property by his father to him, and that he held the property in trust for his father. But, as already stated, the result of this testimony was to show conclusively that Henry A. Willard had no further interest whatever in the property. (Rec., pp. 21–23.)

The court in special term decreed a sale, and the general term on appeal affirmed the decree. (Rec., pp. 23, 26.)

II.

BRIEF OF ARGUMENT.

Five questions seem to be raised by the appellant in this case, although how many of these will be insisted on here we are not yet advised.

1st. Is Henry A. Willard a necessary party to the suit?
2d. Should not special cause be shown for the intervention

of the court and the exercise of the discretion vested in it by the statute?

3d. Is not the lease, outstanding at the time of filing the bill, although now at an end, a bar to this proceeding and to the relief sought?

4th. Has the court power to enforce specific partition in this case?

5th. Has the court power to sell the property for the purpose of partition?

1.

The act of Congress under which this proceeding was instituted is that of August 15, 1876 (19 Stat., 202), which is as follows:

"*Be it enacted, &c.*, That all tenants in common and coparceners of any estate in lands, tenements, or hereditaments, equitable as well as legal, within the District of Columbia, may, in the discretion of the court, be compelled in any court of competent jurisdiction to make or suffer partition of such estate or estates. In proceedings for partition all persons interested shall be made parties in the same manner as in cases of equity jurisdiction; and in proceedings for partition under this act the court may, in addition to the powers herein conferred, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court.

"SEC. 2. That the court, in all cases, in decreeing partition, may, if it satisfactorily appears that said lands and tenements, or any estate or interest therein cannot be divided without loss or injury to the parties interested, decree a sale thereof, and a division of the money arising from such sale among the parties, according to their respective rights and interests.

"SEC. 3. That in all such sales, unless the court shall by special order direct or require, on good cause shown, that the sale be made for cash, the purchase-money shall be payable, one-third on the day of sale, one-third in one year, and one-third in two years thereafter, with interest, the deferred payments to be secured to the parties according to their re-

spective interests by good and sufficient mortgage upon the premises so sold, which shall be subject to the approval of the court."

Before the passage of this act, the only statutes on the subject of partition in force in the District of Columbia were those of 31 Henry VIII, chap. 1, and 32 Henry VIII, chap. 32. In view of the peculiar questions raised by the appellant, it may be permissible to cite the words of these ancient statutes that have practically passed into our common law. The statute of 31 Henry VIII, chap. 1, provides "that all joint tenants and tenants in common, that now be or hereafter shall be, of any estate or estates of inheritance in their own right, or in the right of their wives, of any manors, lands, tenements, or hereditaments, shall and may be coacted and compelled, by virtue of this present act, to make partition between them of all such manors, lands, tenements, and hereditaments."

The statute of 32 Henry VIII, chap. 32, simply extended the same provisions to estates for life and estates for years.

The first question raised by the appellant is that Henry A. Willard is a necessary party to this suit. And the point seems to be made under the clause in the first section of the act of Congress of August 15, 1876, which provides that "in proceedings for partition all persons interested shall be made parties in the same manner as in cases of equity jurisdiction."

It is presumed that this point has been completely disposed of by the testimony in the case that Henry A. Willard has absolutely no interest whatever in the premises. But even if this were not so, and if the contention of the appellant were well founded, that the appellee held under a secret trust for Henry A. Willard, it is not apparent what the appellant has to do with this. It is not apparent of what consequence it is to him whether there is such a secret trust or not; whether Henry A. Willard sold his interest to his son

or made a gift of it to him. That is a matter in which Henry A. Willard and Henry K. Willard alone are interested, and the defendant has nothing in the world to do with it. Evidently, even upon the assumption that there was a secret trust in this case, Henry A. Willard is not a necessary or even a proper party in the sense of the requirement of the statute.

2.

The second point raised by the appellant is that, by the terms of the act of August 15, 1876, it is "*in the discretion of the court*" to compel parties to make or suffer partition; that this is a judicial discretion which should only be exercised upon cause shown; that no cause has been shown here for its exercise; and that a party is not entitled to partition as a matter of course upon his own volition.

The appellee, both in his bill filed in the cause and in the testimony taken upon it, studiously avoided all reference to any and all disagreements and misunderstandings that may have existed between the appellant and himself, or between the appellant and his father, and this forbearance is now urged as an objection to his proceeding. He did not think, and he does not think now, that the exposition of years of contention and ill-feeling is required as a preliminary to the exercise of the jurisdiction vested in the court in the matter of partition.

The right of partition is an absolute right. A tenant in common is entitled, as of course, upon his own volition, and without any assignment whatever of cause, to have his own undivided interest specially determined and set apart to him in severalty. And he is entitled, as of course, to have the aid of a court of equity to make the partition and the assignment for him. It has never been heard before this that he could not go into a court of equity for the purpose without good cause alleged and proved, or that he must have

made preliminary demand upon the other parties in interest, or that he must have made some attempt to dispose of his interest.

Thruston *vs.* Minke, 32 Md., 576.
Savary *vs.* De Camara, 60 Md., 139.
2 White and Tudor's Leading Cases, 507.

Undoubtedly this was the law under the statutes of Henry VIII; and it does not appear that the act of Congress of August 15, 1876, restricted, or was intended to restrict, the right. The words of that statute that seem to be relied upon by the appellant are probably surplusage at best. But, at the utmost, they cannot be construed to mean more in the direction claimed by the appellant than that the court is not compelled to decree partition in all cases if it would be destructive or injurious to the interests of the parties.

It is not the policy of the law governing the subject of partition that the parties in interest should be compelled to quarrel before they could resort to a court of equity. The right of partition was the absolute right of coparceners at the common law, because the law made them coparceners without any act of their own. The statutes have simply placed joint tenants and tenants in common upon the same footing, and modern legislation has enlarged the remedy by authorizing in proper cases, in the discretion of the court, the conversion of the realty into personalty and the partition of the latter.

But if proof of the propriety of the exercise of its discretion in this instance were required, the appellant has amply supplied it by his strenuous resistance to the application for partition in any shape, by his denial of the title of the appellee, and by his questioning of the power of the court to make the partition. If the application of the appellee to the court were unnecessary, the appellant could

easily have demonstrated that fact in his answer by an offer to make the desired partition.

3.

The third objection stated by the appellant is that, on account of a lease outstanding at the time the bill was filed, but now terminated, the complainant was not entitled and is not now entitled to partition.

The appellee himself produced and proved the lease in question, and had no desire to keep it from the court. It is alleged that this lease operates as a bar to the proceeding, and the case of Hunniwell *vs.* Taylor (6 Cushing, 474) has been cited in support of the proposition, and there are other cases also to the same effect.

The case of Hunniwell *vs.* Taylor does undoubtedly support the general position assumed by the appellant. In that case it was said:

"In the present case the petitioner, having at the time of proffering his petition no present right of entry or possession, but only the reversion after the expiration of the leases for years, cannot maintain the petition. Whether the term for years be long or short cannot affect the principle. The fact that the leases have now expired cannot affect the rights of the parties, which must be determined upon the facts as they stood when the process was instituted."

With all due respect to the court which rendered this opinion, and which deservedly stands high in the estimation of the legal profession, it is respectfully submitted that this decision was too narrow and illiberal. It cannot be the policy or the intention of the law that property should have become vacant, useless, and unprofitable before application can be made for its partition. The utmost that in reason could be required in this direction is that the proceedings should be instituted in contemplation of such vacancy, and that the outstanding lease should have been terminated

when the court assumes to act, not when its power of action is first invoked.

But the decision in the case of Hunniwell *vs.* Taylor is overborne by the weight of authority in other States and jurisdictions.

Blakeley *vs.* Colder, 15 N. Y., 617.
Scoville *vs.* Hilliard, 48 Ill., 453.
Hilliard *vs.* Scoville, 52 Ill., 449.
Smith *vs.* Smith, 1 Hoffman's Ch., 506.
Briges *vs.* Sperry, 95 U. S., 401.

And it is not applicable at all in cases where, as now with us and in most States of the Union, sales for the purpose of partition are authorized. What matters it whether there is a present right of entry and possession or not, if the estate is capable of sale and it is expedient that it should be sold, and a purchaser may receive the benefits of it in his purchase?

But this leads us to the complete and conclusive answer to the objection—the fact that the act of Congress of August 15, 1876, was apparently intended to provide for the very difficulty suggested by the case of Hunniwell *vs.* Taylor; for this act of Congress is very much broader and more comprehensive than either the statutes of Henry VIII or the statutes of Massachusetts, under wliich that decision was rendered. It provides not only for partition of estates in possession, but of "*all estates, both equitable and legal*," and of all or "*any estate or interest*" in lands or tenements. The purpose of the statute was evidently twofold: first, to subject to partition not only estates in possession, but all estates and interests whatsoever held in common in lands and tenements; and, second, to authorize sale for the purpose of partition. If the act of Congres of 1876 was not intended to meet the present case, it could not have been more appropriately framed for that purpose.

4.

The appellant, in his answer in this case, advanced the strange proposition that it was beyond the power of the court to enforce partition in severalty in this cause.

The statutes of Henry VIII authorizing partition in severalty against the will even of parties have now been in operation for nearly four hundred years. They have entered into the common law of every common-law State in this Union. They have been declared to be in force in Maryland and in the District of Columbia; and, so far as we are aware, this is the first time that their efficacy has been questioned, or that it has been denied that the undivided interest of a tenant in common may not be ascertained and set off to him in severalty. It is certainly not apparent why that should not be done which has heretofore been done for a hundred years without question under the Federal Constitution.

5.

The appellant's fifth point is of the same character as the fourth—that he cannot be divested of his title by a sale for the purpose of partition.

We presume that this objection is intended to raise the constitutionality of the act of Congress of August 15, 1876; but we fail to see wherein the unconstitutionality consists. We presume that every State in the Union now has similar statutes on this subject, and it does not seem to have ever yet been considered in any of them that a sale of property by a decree of court for the purpose of partition was an unconstitutional taking of the property of the citizen. The time has passed in which it was deemed proper to effect partition by building a wall in the middle of a room, as the English court of chancery is said to have done on one occasion. For agricultural property specific partition may do well enough; but civilization has demanded something else

for property in cities, and legislation has responded to the demand by providing for a sale. The peace and good order of society are subserved by the provision, and no substantial right is lost to the individual. Indeed, the provision, after all, is no more than an enlargement of the ancient arrangement of allowing owelty. It does not appear that there is any substantial foundation for this objection.

6.

The complainant sought the intervention of the court in this case for partition. He was willing to have partition in severalty or a sale for the purpose of partition. He went into the suit with no fixed predilection for either plan. He would have been willing to abide by the preference of the defendant if the defendant had expressed any preference. The defendant opposed all partition. The complainant's witnesses conclusively proved the propriety of a sale. Thereupon the court decreed a sale. It is not often that a decree so manifestly proper and so completely justified by the record is brought to this Court for review. It is respectfully submitted that this decree should be affirmed.

M. F. Morris,
G. E. Hamilton,
For Appellee.